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TRANSMITTAL OF APPEAL BRIEF (Small Entity)

Docket No.
1442.026

Re Application Of: BRENNAN et al.

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
10/055,513	01/23/2002	Robert M. Fetsuga	23405	3751	9358

Invention: FLUID FLOW SYSTEM

COMMISSIONER FOR PATENTS:

Appellant's Supplemental

Appeal Brief to the Board of Patent Appeals & Interferences,

Transmitted herewith in triplicate is the Appeal Brief in this application, with respect to the Notice of Appeal filed on: September 21, 2004, and received in the U.S. Patent and Trademark Office on September 23, 2004, and an Appeal Brief to the Board of Patent Appeals and Interferences originally filed on November 1, 2004.

☐ Applicant claims small entity status. See 37 CFR 1.27

The fee for filing this Appeal Brief is:

☒ A check in the amount of the fee is enclosed was previously paid on November 1, 2004.

☐ The Director has already been authorized to charge fees in this application to a Deposit Account.

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Signature

Dated: April 26, 2005

VICTOR A. CARDONA, ESQ.

Attorney for Applicants - Reg. No. 44,589

HESLIN ROTHENBERG FARLEY & MESITI P.C.

5 Columbia Circle

Albany, New York 12203

Phone: 518-452-5600

Fax: 518-452-5579

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VICTOR A. CARDONA

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CC:

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Title: FLUID FLOW SYSTEM

Date of Signature: April 26, 2005

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Interferences was filed with the U.S. Patent and Trademark Office on November 1, 2004. A Notification of Non-Compliant Appeal Brief was mailed on December 16, 2004, and a response was filed on January 7, 2005. A second Final Office Action was dated February 16, 2005, and this Appeal Brief is a supplemental Appeal Brief in response to the second final Office Action. This Appeal Brief is timely filed within three months of the date of the second Final Office Action, i.e., by May 16, 2005.

REAL PARTY IN INTEREST

Saratoga Spa and Bath Co., the assignee of all the inventors' rights in this patent application, is the real party in interest.

RELATED APPEALS AND INTERFERENCES

To the knowledge of the Appellants, Appellants' undersigned legal representative, and the assignee, there are no appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision in this appeal.

STATUS OF CLAIMS

Claims 1-41 were originally presented in the subject application. Claims 19, 20, 22, 33, and 37-39 were withdrawn from consideration. No claims have been allowed. Therefore, claims 1-18, 21, 23-32, 34-36, 40 and 41 remain rejected and are herein being appealed.

STATUS OF AMENDMENTS

No amendments were filed subsequent to the Final Office Action dated August 3, 2004.

SUMMARY OF CLAIMED SUBJECT MATTER

In a first aspect of the invention (recited in claim 1), a fluid flow system for a hydrotherapy tub is provided. The system includes a body (11, FIGS. 1-3; page 4) configured to be attached to a hydrotherapy tub (30, FIG. 1; page 4) having an opening through a surface (21, FIG. 4; page 7) of the tub such that the body is immovable and affixed to the surface during

operation. The body includes a water inlet (80, FIG. 2; page 5) and an air inlet (90, FIG. 2; page 5). The body also includes a first chamber (50, FIG. 2; page 4) and a second chamber (60, FIG. 2; page 4). The water inlet is configured to extend through the opening to transmit water to the first chamber through the opening. The air inlet is configured to extend through the opening to transmit air to the second chamber through the opening. A plurality of outlets (70, FIG. 2; page 4) is in fluid communication with the first chamber and the second chamber. The plurality of outlets is also configured to transmit water from the first chamber and air from the second chamber to an interior of the hydrotherapy tub.

In a second aspect of the invention (recited in claim 24), a hydrotherapy tub is provided. The tub includes an inner surface (21, FIG. 4; page 7) having an opening therethrough. Also included are an air source (95, FIG. 2; page 5) and a water source (85, FIG. 2; page 5). A body (11, FIG. 2; page 4) is mounted to a hydrotherapy tub (30, FIG. 1; page 4) such that the body covers the opening and the body is immovable and affixed to the inner surface during operation. The body has a first chamber (50, FIG. 2; page 4) and a second chamber (60, FIG. 2, page 4). The first chamber is in fluid communication with the water source through the opening and the second chamber is in fluid communication with the air source through the opening. A plurality of outlets (70, FIG. 2, page 4) is adapted to receive water from the first chamber and to receive air from the second chamber. The plurality of outlets is configured to transmit the water and the air to an interior of the hydrotherapy tub.

In a third aspect of the invention (recited in claim 28), a fluid flow system for hydrotherapy tub is provided. The system includes a body (11, FIG. 2; page 4) configured to be mounted to the hydrotherapy tub (30, FIG. 1; page 4) having an opening through a surface of the tub such that the body covers the opening and the body is immovable and affixed to the surface (11, FIG. 4; page 7) during operation. The body includes a water inlet (80, FIG. 2; page 5) and an air inlet (90, FIG. 2; page 5). The water inlet and the air inlet are configured to extend through the opening. The water inlet and the air inlet are configured to transmit water and air, respectively, through the opening. The body further includes means for providing a plurality of jets of water-air froth (50, FIG. 2; page 4; 60, FIG. 2; page 4; 70, FIG. 2, Page 4) to an interior of the hydrotherapy tub from the body.

In a fourth aspect of the invention (recited in claim 34), a method for controlling fluid flow to a hydrotherapy tub is provided. The method includes mounting a body (11, FIG. 2; page 4) to a hydrotherapy tub (30, FIG. 1; page 4) having an opening through a surface (21, FIG. 4; page 7) of the tub such that the body covers the opening and the body is immovable and affixed to the surface during operation. The body includes an air inlet (90, FIG. 2; page 5) and a water inlet (80, FIG. 2; page 5). The water inlet and the air inlet extend through the opening and are configured to receive water and air, respectively, through the opening. The body further includes means for providing a plurality of jets of water-air froth (50, FIG. 2; page 4; 60, FIG. 2; page 4; 70, FIG. 2, Page 4) to an interior of the hydrotherapy tub from the body.

In a fifth aspect of the invention (recited in claim 40), a method for controlling fluid flow to a hydrotherapy tub is provided. The method includes mounting a body (11, FIG. 2, page 4) to a hydrotherapy tub (30, FIG. 1; page 4) having an opening through a surface (21, FIG. 4; page 7) of the tub such that the body covers the opening. The body is immovable and affixed to the surface during operation and the body receives water and ambient air through the opening. The method further includes providing a plurality of jets of water-air froth to an interior of the hydrotherapy tub from the body.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. Claims 1-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 112, first paragraph, as allegedly containing subject matter not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors at the time the application was filed had possession of the claimed invention. In particular, the Office Action alleges that the phrase “immovable and affixed to said surface during operation”, in claims 1, 24, 28, 34 and 40 is new matter.

2. Claims 1-5, 7, 10, 18, 21, 22, 24, 25, 28, 29, 31, 32, 34-36 and 40 stand rejected under 35 U.S.C. § 102(a)/(e) as being anticipated by Gardenier et al.

3. Claims 1-10, 18, 21-23 and 28-32 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Martin ‘259.

4. Claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin '259.

5. Claims 1-10, 16-18, 21-32, 34-36, 40 and 41 stand rejected under 35 U.S.C. § 103(a) as being obvious over Martin '259 in view of Gardenier.

6. Claims 11-15 stand rejected under 35 U.S.C. § 103 as being obvious over Martin '259, alone, or taken with Gardenier et al. '303, and further in view of Guiler '982.

ARGUMENT

1. Rejections Under § 112, First Paragraph:

Claims 1-18, 21, 23-32, 34-36, 40 and 41 were rejected in the second Final Office Action as containing subject matter which was not described in the specification as to reasonably convey to one skilled in the art that the inventor, at the time the application was filed, had possession of the claimed invention. Specifically, claim 1 recites, *inter alia*, a body "immovable and affixed to said surface during operation." The second Final Office Action rejects this language and considers it to be new matter, since the Office Action argues that Appellant's device is not immovable nor attached to side walls of a body as Appellant has previously argued. The Appellant had previously argued that the figures clearly disclose the immovability of the device during operation by the depiction in FIGS. 1 and 2, which show the device being inserted through a hole in a wall of a spa and being attached via nut 260 attached to threads 255 of side walls 250 of body 11. Further, the second Final Office Action argues that Appellant's disclosure fails to teach a "device being inserted through a hole in a wall of a spa and being attached via nut 262 [260] attached to threads 255 of side walls 250 of body 11".

The standard for an adequate written description to support a particular claim turns on whether a person of ordinary skill in the art is able to recognize that what has been claimed has been invented by the Appellant. Further, the written description requirement can be satisfied by a drawing if the subject matter claimed would be understood to one skilled in the art from the drawing and description. Moreover, the drawings alone may satisfy this requirement. See Vas-Cath Inc. v. Mahurkar, 19 U.S.P.Q.2d at 1116-1118 (Fed. Cir. 1991), 935 F.2d 1555.

The depiction in FIG. 2 of the threads and the nut which allow the attachment of the body through an opening to the wall of the spa conform with the written description requirement since it would be understood by one skilled in the art from such drawing that once the body was attached to the spa, it would be immovable and affixed to the surface of the spa during operation. Paragraph 29 on page 8 of the application also describes a fluid flow system 10 which includes side walls 250 surrounding inlets 80 and 90 and such side walls including exterior threads 255 for mating with a nut 260 to securely position the fluid flow system on tub wall 20. The previous rejection by the Examiner of this claim due to the lack of a recitation of a “nut” does not take into account that the specification must merely disclose one embodiment of the device supported by the specification. Each detail of the specific embodiment depicted in the drawings and described in the specification do not need to be themselves explicitly claimed.

The Second Final Office Action notes that the side walls are illustrated as part of the tub in FIG. 2 and that paragraphs 31 and 34 describe a tub wall having threads which may unitary and/or integral. The Office Action fails to note that the tub wall having threads which may be unitary and/or integral describes one example of the invention on page 9. However, paragraph 29 (page 8) describes the fluid flow system having side walls and such side walls having threads 255 which mate with a nut to securely position the fluid flow system on the tub wall, which when viewed in conjunction with FIG. 2 would make clear to one skilled in the art that the fluid flow system may be immovable and affixed to a surface of the tub during operation. In particular, the figure and description in paragraph 29 make clear that the fluid flow system is attached to the tub wall. Further, it would be clear to one skilled in the art that it would remain affixed thereto and immovable during the operation described in the specification, i.e., the discharge of water and air through the body of the fluid flow system.

Further, even if the Examiner was correct and it was a requirement that the side walls be a part of the tub, it is still clear from the specification and the drawings that the body is immovable and affixed to the surface during operation. If the parts of the flow system were unitary or integral to the tub, the body would be immovable and affixed. Further, as noted above, the fluid flow system is securely positioned on the tub wall. Moreover, paragraph 30 describes a fluid flow system as being mounted to the tub wall using epoxy. Paragraph 30

further describes secure fastening of inlets to respective fluid supply conduits and the fluid flow system being affixed in a recess of the tub wall. Accordingly, it would be understood to one skilled in the art that the body would be immovable and affixed to the surface of the tub during operation.

Also, the previous Final Office Action stated that the system is clearly capable of being moved in the absence of nut 260. However, the claim language needs merely to be supported by the specification for it to satisfy the written description requirement. The claim language "affixed and immovable" relates to the embodiment depicted having the nut attached to the threads of the body such that the body is "immovable and affixed" during operation. The fact that it is possible for the nut to be removed and the body to be movable instead of immovable is irrelevant since an embodiment in which the body is immovable and affixed during operation is supported by the specification.

Thus, it would be clear to one of ordinary skill in the art that Appellant would have had possession of the claimed invention at the time of filing. Accordingly, it is respectfully submitted that claims 1, 24, 28, 34 and 40 satisfy the written description requirement under § 112, first paragraph, and this rejection is believed to be overcome.

2. Rejections Under 35 U.S.C. § 102(a)/(e) Over Gardenier et al.:

The Final Office Action dated February 16, 2005 newly rejected claims 1-5, 7, 10, 18, 21, 22, 24, 25, 28, 29, 31, 32, 34-36 and 40 as being anticipated by Gardenier et al. More specifically, relative to claim 24, the Gardenier et al. reference is alleged to disclose an inner surface 11 including an opening (receiving 50), an air source/means (column 3, lines 6-9), a water source/means (column 3, lines 6-9), a body 10 including a first chamber 16 and a second chamber 18, a plurality of outlets/means 20, 22, a water inlet 14, and an air inlet 12. Relative to claim 7, the reader is referred to column 6, lines 6-9 while relative to claim 10, the reader is referred to column 6, lines 60-63.

Claim 24 was specifically referred to in the Office Action and thus is addressed initially herein.

Anticipation requires every element and limitation of a claimed invention to be found in a single prior art reference, arranged as in the claim. Karsten Mfg. v. The Cleveland Golf Company Co., 242 F.3d, 1376, 1383, 58 USPQ 2d, 1286, 1291 (Fed. Cir. 2001); Scripps Clinic & Research Foundation v. Gentech, Inc., 927 F.2d, 1565, 1576, 18 USPQ 2d, 1001, 1010 (Fed. Cir. 1991).

Claim 24 recites, *inter alia*, a hydrotherapy tub which includes a body having a first chamber in fluid communication with a water source through an opening in an inner surface of the hydrotherapy tub. A second chamber is in fluid communication with an air source through the opening. A plurality of outlets are adapted to receive water from the first chamber and to receive air from the second chamber. The plurality of outlets is configured to transmit the water and the air to an interior of the hydrotherapy-tub.

Gardenier et al. discloses a hydrotherapy-tub multiple slot flow device which includes a first chamber 18 which is in fluid communication with a fluid supply conduit and which includes an outlet for discharging the fluid. A second chamber 16 is in fluid communication with a second fluid supply conduit and includes a second outlet for discharging the fluid. However, there is no disclosure in Gardenier et al. of a plurality of outlets adapted to receive water from the first chamber and air from a second chamber, nor such plurality of outlets being configured to transmit the water and air to an interior of a hydrotherapy-tub. Instead, Gardenier et al. discloses two separate chambers with separate inlets and separate outlets. The outlets do not receive water from a first chamber and air from a second chamber, nor are the outlets configured to transmit the water and the air to an interior of the hydrotherapy tub. Thus, because claim 24 of the present application is not identically disclosed by Gardenier et al., this claim cannot be anticipated thereby. The dependent claims are believed not to be anticipated for the same reasons and for their own additional features.

Claim 1 also recites, *inter alia*, a first plurality of outlets in fluid communication with a first chamber and second chamber and the plurality of outlets being configured to transmit water from a first chamber and air from a second chamber to an interior of a hydrotherapy-tub. This claim is thus believed to be allowable for the same reasons described above for claim 24. The claims depending on claim 1 are also believed to be allowable for the same reasons and for their

own additional features.

Relative to claim 7, the Office Action references column 6, lines 6-9 of Gardenier et al. which describes that each fluid described in Gardenier could be a group of fluids and two fluids could be merged into substantially co-planar flow. However, there is no disclosure in Gardenier of outlets which are in fluid communication with a first chamber and a second chamber. Instead, the multiple fluids described in column 6 refer to multiple fluids being received in one of the chambers disclosed therein and discharged from the same chamber, without a plurality of outlets and in fluid communication with a first chamber and a second chamber. Thus, because the features of claim 1 are not identically disclosed by Gardenier et al. as described above, claim 7, which is dependent on claim 1, cannot be anticipated thereby.

Also, the Office Action refers the reader to column 6, lines 60-63 of Gardenier et al. relative to claim 10 of the present application. The referenced lines of Gardenier et al. describe that alternative embodiments may include three more inlets fluidly connected to a plurality of outlets. The text goes on to describe that the inlets may be fed by multiple supply conduits or a single supply conduit which splits into multiple outlets for connection to the inlets. However, there is no disclosure of a plurality of outlets which are in fluid communication with a first chamber and a second chamber nor such plurality of outlets being configured to transmit water from a first chamber and air from a second chamber to an interior of the hydrotherapy tub. Instead, the reference discloses one inlet with multiple supply conduits or one conduit with multiple outlets without any reference to first and second chambers being in fluid communication with outlets as is recited in claim 1. Thus, because claim 1 cannot be anticipated by Gardenier et al. as described above, dependent claim 10 is also not anticipated due to its dependence on claim 1 and for its own additional features.

3. Rejections Under 35 U.S.C. § 102(b) as Being Anticipated by Martin '259:

The second Final Office Action newly rejected claims 1-10, 18, 21-23 and 28-32 as being anticipated by Martin '259. In particular, the Office Action alleges that FIGS. 7-10 of Martin '259 disclose a fluid flow system which includes a body 59 including a water inlet 5, an air inlet 6, a first chamber 68, second chamber 69 and a plurality of perpendicular

outlets/means 75 as claimed. The Office Action further alleges that the Martin body is capable of being used with the tub having an opening (e.g., in the bottom) as functionally recited. Also, the Office Action alleges that should one decide to insert the air and water inlets 5, 6 through the opening, the body would cover the opening and be “immovable and affixed to said inner surface during operation” in the same sense as Appellant’s disclosed invention. Also, the reader is referred relative to claim 18 to page 5, lines 46-52.

Initially, Appellant notes that FIGS. 7-10 of Martin ‘259 are first raised in the most recent Final Office Action. This reference discloses an apparatus for insertion into a bath tub which is placed on an interior surface of the tub. The apparatus receives fluids through conduits which pass through an interior fluid containing portion of the bath tub. In particular relative to the noted figures, a water conduit is connected to a water faucet and to the apparatus, while an air conduit has one end attached to the apparatus and a second end which is located above a water level of the tub such that it receives ambient air.

However, there is no disclosure in Martin ‘259 of a body configured to be attached to a hydrotherapy tub having an opening through a surface of the tub such that the body covers the opening and the body is immovable and affixed to the surface during operation. Instead, Martin discloses a device which is placed on the bottom of a tub and which receives fluid through a conduit placed in the tub and a second conduit which passes through the tub to the ambient atmosphere. There is no disclosure in Martin of a water inlet configured to extend through an opening and to transmit water to the first chamber through the opening nor an air inlet configured to extend through the opening to transmit air to the second chamber through the opening. The Office Action alleges that the tub opening disclosed (i.e., the drain) could substitute for the opening recited in claim 1. The Office Action also alleges that the body would then cover the opening and be “immovable and affixed to said inner surface during operation”. This assertion in the Office Action ignores the fact that the Martin device does not disclose the insertion of the conduits therein through a drain, nor that such a drain is designed to allow the tub to empty water therefrom, and not to receive water and air conduits. Thus, the Martin device could not include water inlets or air inlets configured to extend through openings in a surface thereof. Instead, as noted above, the conduits of Martin extend toward a faucet and above a water surface, but there

is no disclosure of inlets configured to extend through openings in a tub. Moreover, even if inlets were to extend through the drain as alleged in the second Final Office Action, such drain would no longer be a “drain” due to the insertion therein of such inlets or conduits thereby making it unsatisfactory for its intended purpose.

Moreover, the device disclosed in Martin ‘259 is not affixed to the surface of the tub during operation. Instead, the apparatus includes legs 79 and pads 80 which rest on the surface of the tub but the device itself is not affixed to the surface thereof.

Accordingly, all of the features of claim 1 are not found in Martin ‘259 as arranged in the claim, and Martin ‘259 cannot anticipate claim 1. Independent claims 24, 28, 34 and 40 are believed not to be anticipated for the same reasons. The dependent claims are believed not to be anticipated for the same reasons and for their own additional features.

Regarding claim 18, as noted above, the reader was referred to page 5, lines 46-52. These lines describe that liquid may be delivered under pressure to injectors to entrain air or other gas therewith or the gas or other air may be delivered under pressure to injectors to entrain liquid therewith,. Claim 18 recites, inter alia, the first and second chambers comprising first and second longitudinal portions which are located about parallel to an inner surface of the hydrotherapy tub and the second chamber being configured to be located between the first chamber and the inner surface. The referenced line numbers on page 5 do not appear to relate to this claim.

Claim 8 recites, inter alia, at least one outlet which is adapted to provide water-air froth through a venturi effect. It is not clear if the Office Action intended to refer to this latter claim, but even if it was, claim 8 and claim 18 are believed to be allowable for the same reasons as claim 1 described above and for their own additional features, e.g., the venturi effect recited in claim 8.

4. Rejections Under 35 U.S.C. § 103(a) Over Martin '259:

The second Final Office Action newly rejected claims 1-10, 16-18, 21-23 and 28-32 as being obvious over Martin '259. In particular, the Final Office Action alleges relative to claim 16 that although the air outlets are not located inside the water outlets as claimed, it would have been obvious to one of ordinary skill in the art to reoriented air and water outlets as merely involving reversal of parts wherein a hydrotherapy tub would not be materially affected. Also, FIGS. 12 and 13 are alleged to disclose utilizing air outlets 139 located inside water outlets 140.

The obviousness rejection relative to Martin '259 thus appears to relate only to claim 16. As noted above, this claim is believed to be allowable for the same reasons as claim 1 and for its additional features. In particular, Appellant respectfully disagrees that it would be obvious to orient the air outlet 75 of Martin such that they were located inside the water outlets. As depicted in FIG. 9 of Martin '259, an air outlet has a water outlet therein with the air outlet being located on top of the water outlet. The mere reversal of parts alleged by the Office Action would not be a simple matter. For example, beside the relocation of the water and the air outlets, the water and air compartments in Martin '259 would need to be vertically interchanged and the diameters of the appropriate injectors reversed, and there is no suggestion or motivation which would cause one skilled in the art to perform such a wholesale reconstruction of the Martin '259 device.

5. Rejections Under 35 U.S.C. § 103(a) Over Martin '259 and Gardiner et al. '303:

The second Final Office Action rejected claims 1-10, 16-18, 21, 23-32, 34-36, 40 and 41 as being obvious over Martin '259 and Gardiner et al. '303. More specifically, the Office Action dated March 31, 2004 alleges that FIG. 11 of Martin '259 discloses all of the features of claim 1 except that the inlets of the '259 hydrotherapy tub do not extend through an opening. It is alleged that in consideration of Gardiner et al. '303, it would have been obvious to one of ordinary skill in the art to associate an opening with the '259 tub to facilitate installation. It is unclear from the most recent Office Action (dated February 16, 2005) which embodiment (i.e., FIGS. 7-10 or 11-13) of Martin '259 this rejection is intended to refer to.

Martin discloses an apparatus for insertion into a bathtub which is placed on an interior surface of the tub and receives fluid through rigid conduits which pass through an interior water containing portion of the bathtub. Specifically, referring to FIG. 11 per the March 31, 2004 Office Action, a pump external to the tub removes water from a standpipe 91 and re-circulates the water through a water supply conduit running through the center of the standpipe to a manifold for injecting water and air to the interior of the tub. Ambient air is received into the manifold passively via a vertical pipe which extends above the water's surface of the tub. However, Martin does not disclose an apparatus being configured to be attached to a hydrotherapy tub having an opening through a wall of such tub. Further, there is no disclosure of a body having a water inlet configured to extend through such an opening to transmit water to a first chamber. Martin does not disclose a body having an air inlet configured to extend through an opening to transmit air to a second chamber. Moreover, there is no disclosure of a body including such first and second chambers, which is configured to be attached to a hydrotherapy tub such that the body covers an opening therein and is affixed to a wall of the hydrotherapy tub during operation. Instead, Martin discloses in FIG. 11 a device which rests on an interior surface of a tub, receives water via conduits which extend out of the tub over a side thereof and which receives air via a vertical pipe extending above a surface of the water contained in the tub. However, there is no disclosure in Martin of an opening in a tub which is covered by a body having a first chamber and a second chamber, nor water and air inlets of the body extending through such an opening to transmit water and air through the opening to the first and second chambers, nor the body being immovable and affixed to the surface of the tub during operation.

Regarding the allegation in the February 16, 2005 and March 31, 2004 Office Actions that the Martin '259 device is capable of receiving water and air through a single opening in a tub, there is no disclosure in this reference of receiving water and air through an opening in the tub. Instead, the water and air conduits in Martin extend through a water containing portion of a tub with the water conduits extending above a side of the tub and the air conduit extending vertically above a water's surface to allow ambient air to flow therein.

Further, it is not clear from the Office Action how the device in Martin could receive water or air from a single opening as alleged. In particular, there is no allegation how the

standpipe would receive return water if it was located outside the water containing portion of the tub, for example. Also, there is no indication of how the water supplying conduit and water expelling conduit would extend through a same opening in the tub or even different openings therein, particularly since these pipes appear to be rigid and thus not easily manipulated. Instead, the conduits are not located relative to one another to allow them to extend through a single opening, and even if they were to extend through such a single opening, there is no allegation of how the tub would be sealed to prevent leakage through such opening. Moreover, the device in FIG. 11 includes a vertical pipe for receiving ambient air from above the water's surface, and there is no allegation of how such vertical pipe would be configured to extend through a same opening as the receiving and expelling water conduits, nor how such realigned air conduit would access ambient air. Further, there is no allegation of how the water and air conduits in Martin '259 could extend through such a single opening to allow a body thereof to cover such opening.

Also, there is no suggestion, teaching, or motivation in Martin, which would cause one skilled in the art to put a hole in the tub disclosed therein and attempt to fit the two water conduits and the air conduit therethrough. In fact, Martin teaches away from creating such an opening, because water in Martin is supplied by the water conduit extending outside the tub or via a faucet in the tub (see Fig. 7). The alteration of a tub by cutting holes therein is not compatible with either of these water supply approaches.

Further, even if there was a reason to create such an opening, the Office Action does not allege how such conduits would be aligned and would extend through the opening. For example, the air conduit is depicted as extending from the top surface of the manifold above a water's surface, but it is unclear how the manifold and/or vertical pipe would be realigned to allow it to extend through an opening in the tub, nor how such a realigned conduit would access ambient air. Further, there is no allegation regarding how a body of the device disclosed in Martin could be affixed to a surface of the tub such that the body covers any opening therethrough. Moreover, there is no allegation in the Office Action of inlets extending through such an opening. Instead, the Office Action merely alleges that one of ordinary skill in the art would associate an opening with the Martin tub to facilitate installation. However, the Office Action does not allege a

disclosure, teaching, or suggestion in Martin which would cause one to put such hole in a tub, nor how such a device would function.

There are three embodiments of the Martin device disclosed, but despite the variation in the disclosed embodiments, none of these devices include an opening in the tub to allow water and air to pass therethrough and which is covered by a device affixed to the surface of such a tub. Instead, the routing of rigid water and air conduits away from the tub's surface in the embodiments depicted in FIGS. 11- 13 teaches away from such an opening. Accordingly, the embodiments utilizing a conduit connected to a water faucet of the tub also teach away from creating an opening in the tub to receive a water and air inlet since the conduits of the device connect to the faucet and the air conduit extends above the water surface, thus negating any need to create such an opening. Thus, there is no teaching, suggestion or motivation disclosed in Martin '259 to cause one to combine Martin '259 with Gardenier et al. or to provide the tub disclosed in Martin with an opening, as alleged in the Office Action. As noted, the Office Action alleges that it would be obvious to associate an opening with the tub in Martin '259 to facilitate installation thereof, but there is no teaching, suggestion, or motivation in Martin '259 to cause one to look to Gardenier or create such an opening and in fact there are three embodiments disclosed in this reference, none of which envision an opening in the tub disclosed therein. Instead, it is only with impermissible hindsight reasoning of Appellant's invention that Martin '259 and Gardenier et al. have been combined in an attempt to support an obviousness rejection of the independent claims. Such hindsight reasoning is improper.

Also, the Office Action dated March 31, 2004 alleges that the purposes of both the Martin '259 and Gardenier fluid flow systems is to provide hydrotherapy via air and water jets connected to respective fluid chambers in a body supported on the bottom surface of the tub. The March 31, 2004 Office Action alleges that whether the fluid inlets to the chambers extend through an opening and a tub surface/wall or extend over the wall of the tub would not affect the ability of the system to provide hydrotherapy. Appellant acknowledges that either way hydrotherapy is provided, but a wholesale reconstruction of the Martin '259 device is not taught by Gardenier et al. Instead, Gardenier et al. provides an opening in a tub wall and injector which extends therethrough, but none of the other elements of claim 1 are disclosed by this reference.

The Office Action alleges that the elements missing from Gardenier et al. are disclosed by Martin '259. However, the device in FIG. 11 of Martin '259 is not even remotely configured to provide fluid communication through a wall of a tub. In particular, the air supply pipe extends upwardly away from the body of the device. The water return device and water supply device are both received within the water containing portion of the tub and it is unclear how they could be separated such that a water supply conduit and air supply conduit would extend through an opening in the tub. In particular, the water supply conduit extends through a standpipe for receiving return water and a top portion of the standpipe body is connected to a conduit which extends over a top portion of the tub. Further, the device disclosed in FIGS. 7-10 of Martin '259 includes a water conduit which extends to a faucet and an air conduit which extends above a water surface of the tub, but there would be reason to extend these conduits, nor inlets to a body as recited in claim 1, through a wall of a tub. To perform the Office Action's proposed combination, the entire device in Martin '259 would need to be reconstructed.

The March 31, 2004 Office Action further alleges that both devices deal with hydrotherapy and therefore it would be obvious to put an opening in the tub in Martin '259. This neglects the specific teachings of Martin '259 and the requirement to consider a reference as a whole, including portions which argue against obviousness. Baush & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc., 230 U.S.P.Q. 416, 420 (Fed. Cir. 1986), 796 F.2d 443,450. Viewing Martin '259 as a whole, there would be no reason to reconstruct the entire device such that the air supply conduit was reversed or otherwise reconstructed such that it no longer extends above the water surface to receive air and instead extends below such surface. Further, when viewing this reference as a whole, one would not seek to reconstruct this device such that water and air conduits extended from the body thereof such that they could extend through a single opening in the tub.

Moreover, such a reconstruction would be impossible considering the use of the standpipe for receiving return water and the routing in Martin '259 of the water supply line through a center of this standpipe. The standpipe itself must remain in the water containing portion of the tub to allow it to function and receive return water from the containing portion. There is no allegation in the Office Action which even deals with the water standpipe or how this

device could be reconstructed such that it could extend through an opening in the tub. Thus, even if the references were combined as alleged, the proposed combinations would not be functional and would not be satisfactory for the intended purpose of hydrotherapy, nor would it satisfy the subject matter of claim 1 of the present application.

The Office Action dated February 16, 2005 further alleges that Martin '259 cannot teach away from creating an opening in a tub. In particular, the Office Action alleges that the fluid flow systems illustrated in Martin are merely exemplary and a reader is referred to page 2, lines 103-106. These lines states that the described apparatus may be used in tubs, pools, or other bathing places such as the tub 39 indicated in FIG. 1 of the drawings. Appellant respectfully disagrees that the reference cannot teach away from creating an opening. As discussed above, several embodiments of the device are described and illustrated, yet none of these include a body having inlets which extend through an opening of the tub nor such a body covering the opening and being immoveable and affixed to the surface of the tub during operation.

Further, the February 16, 2005 Office Action notes that one of the supply conduits in Martin '259 extends through a tub wall and the reader is referred to FIG. 7. Appellant assumes that the Office Action intends to refer to the water supply conduits which extends to a standard water faucet of the tub. Appellant respectfully disagrees that such a conduit would be equivalent to a body having an inlet which extends through an opening of the surface of a tub or such a body covering the opening and any being immovable and affixed to an inner surface of the tub during operation. As described in the present application and depicted in the figures, an inlet includes an entry point into the body of a fluid flow system, but such inlet would not include a conduit which is attached to such a body. In particular, an inlet might include the end of pipe 63, depicted in FIG. 7 of Martin '259, but such an inlet would not include conduit 11 which extends away from the device and pipe 63 which splits into a portion which extends to a faucet and a second portion which extends above the water surface such that ambient air may flow therethrough. Thus, Appellant respectfully disagrees with the Examiner's assertion that Martin '259 discloses the extension of a supply conduit through a tub wall, or the extension of an inlet of a body through an opening in a surface of a hydrotherapy tub. Further, as noted above,

Appellant respectfully asserts that the Office Action neglects to consider the Martin '259 reference as a whole. As noted, there would be no reason to reconstruct the Martin device such that the tub thereof includes another opening nor the extension of inlets of a body through such an opening.

The Office Action dated February 16, 2005 also disputes Appellant's argument that Martin has not been considered by the Examiner as a whole by notes that the Martin disclosure is not as narrow as Appellant portrays and points the reader to page 5, lines 72-77, and claim 7. The indicated lines of the specification merely state that the invention of Martin is not limited to the embodiments disclosed in the patent itself. The noted claim recites a manifold having two compartments, and means for mixing and discharging gas or liquid from such conduits or compartments along with the means including two tubes of different diameters extending one within the other. Appellant respectfully disagrees that the lines of the specification which say the embodiments are only exemplary supply a rationale for not viewing the Martin reference as a whole. Further, the indicated claim would not change the fact that when viewing Martin as a whole there would be no reason to reconstruct the device in Martin such that air and water inlets thereof extended through a single opening in a tub. Instead, as noted, the device in Martin is connected to conduits which extend above a water surface and/or to a faucet of a tub. There is clear difference between an inlet of a body which extends through an opening in a tub and a connection of a device resting on a surface of a tub to conduits which extend in the manner depicted in Martin '259.

Therefore, there would be no suggestion or motivation to combine Martin '259 with Gardenier, and such combination is done only with impermissible hindsight reasoning. Further, even if the references were combined as alleged, such a combination would not result in the subject matter of claim 1 in the present application. Accordingly, the alleged combination cannot make claim 1 of the present application obvious. Claim 1 is believed to be allowable and the dependent claims are believed to be allowable for the same reasons and for their own additional features.

Claim 24 recites the subject matter of claim 1 in combination with a hydrotherapy tub and is, therefore, believed to be allowable for the same reasons as claim 1 and for the additional

feature of a hydrotherapy tub being combined therewith. Thus, claim 24 is believed to be allowable along with the dependent claims which are believed to be allowable for the same reasons and for their own additional features.

Claim 28 recites, *inter alia*, a fluid flow system for a hydrotherapy tub which includes a body configured to be mounted to a hydrotherapy tub having an opening through a surface of the tub such that the body is removable and affixed to the surface during operation. The body includes a water inlet configured to extend through the opening and an air inlet configured to extend through the opening. The water inlet and air inlet are configured to transmit water and air, respectively, through the opening in the wall. Also included are means for providing a plurality of jets of water-air froth to an interior of the hydrotherapy tub from the body.

As described above, there would be no reason to combine Martin '259 and Gardenier et al. Further, even if combined, the combination would not result in the subject matter of claim 28 of the present application. In particular, claim 28 is not believed to be anticipated for the same reasons as claim 1. Further, there is no reason to believe that the reconstruction of Martin '259 to allow it to be combined as alleged would be functional to provide hydrotherapy. Accordingly, such a combination could not result in the subject matter recited in claim 28 of present application, and this claim is believed to be allowable. The dependent claims are believed to be allowable for the same reasons and for their own additional features.

Further, claim 34 is believed to be allowable for the same reasons as claim 28. The claims depending on claim 34 are, therefore, believed to be allowable. Claims 40 and 41 are believed to be allowable for the same reasons as claims 28 and 34, for their own additional features. Thus, claims 40 and 41 are believed to be allowable.

6. Rejections Under 35 U.S.C. § 103(a) Over Martin '259 with Gardenier '303 and Guiler '982:

Claims 11-15 stand rejected as being obvious over Martin '259 either alone or taken with Gardenier as applied to claim 1 and further in view of Guiler '982. The Office Action alleges that although Martin '259 and Gardenier do not include conical structures, such structures are

disclosed in the Guiler reference. Further, the Office Action (March 31, 2004) alleges that Appellant has acquiesced to this ground of rejection by not responding substantively thereto.

Appellant has stated in previous Responses to Office Actions that these claims are believed to be allowable for the same reasons as their base independent claims and for their own additional features. Further, a review of Guiler does not provide the teachings alleged by the Examiner. In particular, the Examiner refers to a nozzle or ejector 18 mounted within a nozzle box which restricts the flow of water thereby drawing air from a pipe extending above a water surface and allowing water to be ejected through a outlet 22 into a tub. However, the Office Action does not allege how the disclosure of a conical pipe discloses a water chamber having conical structures for changing a velocity of water as recited in claim 11. Further, there is a no disclosure of a plurality of such structures nor a plurality of air outlets transmitting water to the plurality of conical structures as recited in claim 12. Moreover, there is no disclosure of air outlets extending from a second chamber into a plurality of conical structures. Also, there is no disclosure of air being drawn into the plurality of conical structures as recited in claim 13. Instead, Guiler merely discloses a conduit for conducting water which has an end which is constricted in a conical shape, but it does not disclose a water chamber having a conical structure, nor is there any indication of how such a conically shaped conduit could be combined with Martin and the chambers allegedly disclosed therein to comprise a water chamber having conically shaped structures nor the details thereof recited in claims 11-15. Accordingly, even if the references were combined as alleged, they would not result in the subject matter recited in claims 11-15.

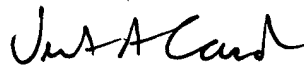
The Office Action dated February 15, 2005 also argues that Appellant cannot establish non-obviousness by attacking the Guiler '982 reference individually when the rejection was predicated on a combination of prior art disclosures. The Office Action states that Guiler '982 was relied upon for teaching a conduit with a conically shaped end. Appellant notes the conical pipe, but as noted above the mere existence of a conical pipe in a drain mounted hydrotherapeutic apparatus for a bath tub does not provide a motivation to utilize a conical structure in a first chamber of the body recited in claim 1 of the present application. Instead, the conical pipe in the Guiler apparatus is not even remotely related to the body recited in claim 1 of

the present application which includes inlets which are extended to an opening of a hydrotherapy tub and a body which covers the opening and is immovable and affixed to the surface of a tub during operation. In fact, the conical pipe in Guiler is clearly not in a body which extends through a tub and would not suggest utilizing a conical structure in the same. Thus, Appellant respectfully asserts that the mere existence of conically shaped pipes would not disclose, teach, or suggest a plurality of conical structures of a first chamber nor the other features relative to claim 1 discussed above. Thus, this rejection is believed to be overcome.

CONCLUSION

In conclusion, Appellant submits that claims 1-18, 21, 23-32, 34-36, 40 and 41 satisfy 35 U.S.C. § 112, first paragraph. Claims 1, 3, 4, 10, 21, and 28 satisfy 35 U.S.C. § 112, second paragraph. Martin '259 teaches away from the subject matter recited in the independent claims, and further, a combination of Martin '259 and Gardenier would not result in the subject matter of the cited claims. Further, there is no suggestion or motivation for combining these references, and even if they were combined such a combination would not be operable for its intended purpose. Also, Guiler does not disclose the features of claims 11-15, which are alleged by the Office Action, and thus even if the references were combined as alleged, it would not result in the subject matter of these claims. Accordingly, it is respectfully submitted that these references can not make the claims of the present application obvious. Therefore, Appellant submits that the Final Office Action should be reversed in all respects.

Respectfully submitted,



Victor A. Cardona, Esq.
Attorney for Appellant's
Reg. No. 44,589

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HESLIN ROTHENBERG FARLEY & , P.C.
5 Columbia Circle
Albany, NY 12203-5160
Telephone: (518) 452-5600
Facsimile: (518) 452-5579



Claims:

1. ***(Previously Presented)*** A fluid flow system for a hydrotherapy-tub, said system comprising:

a body configured to be attached to a hydrotherapy tub having an opening through a surface of said tub such that said body covers the opening and said body is immovable and affixed to said surface during operation, said body comprising:

a water inlet and an air inlet;

a first chamber said water inlet configured to extend through the opening to transmit water to said first chamber through the opening;

a second chamber, said air inlet configured to extend through the opening to transmit air to said second chamber through the opening;

a plurality of outlets in fluid communication with said first chamber and said second chamber; and

wherein said plurality of outlets is configured to transmit water from said first chamber and air from said second chamber to an interior of the hydrotherapy-tub.

2. ***(Original)*** The system of claim 1 wherein said body is adapted to be mounted to cause said first chamber to be located between said second chamber and the interior of the hydrotherapy-tub.

3. ***(Original)*** The system of claim 1 wherein said body is adapted to be mounted on an inner surface of the hydrotherapy tub.

4. ***(Original)*** The system of claim 1 wherein said first chamber comprises one inlet adapted for fluid communication with the water source and said second chamber comprises one inlet adapted for fluid communication with the air source.

5. ***(Original)*** The system of claim 1 wherein the air source comprises ambient air outside said second chamber.

6. ***(Original)*** The system of claim 5 wherein at least one outlet of said plurality of outlets is adapted to draw said ambient air from the air source.

7. ***(Previously Presented)*** The system of claim 1 wherein at least one outlet of said plurality of outlets is adapted to provide a water-air froth to the interior of the hydrotherapy tub.

8. ***(Previously Presented)*** The system of claim 7 wherein said at least one outlet is adapted to provide said water-air froth through a venturi effect caused by fluid communication of said at least one outlet with water from said water source, when in fluid communication with said first chamber, and air from said air source, when in fluid communication with said second chamber.

9. ***(Previously Presented)*** The system of claim 7 wherein said at least one outlet is adapted to draw air from said second chamber, when in fluid communication with said air source, via a venturi effect.

10. ***(Original)*** The system of claim 1 wherein said second chamber comprises a plurality of air outlets configured to transmit air to at least one of said first chamber and said plurality of outlets.

11. ***(Original)*** The system of claim 1 wherein said first chamber comprises a plurality of conical structures for changing a velocity of the water, when said first chamber is in fluid communication with said water source.

12. ***(Original)*** The system of claim 11 wherein said second chamber further comprises a plurality of air outlets configured to transmit air to said plurality of conical structures, when said second chamber is in fluid communication with said air source.

13. **(Original)** The system of claim 12 wherein said plurality of air outlets extend from said second chamber into said plurality of conical structures.

14. **(Original)** The system of claim 11 wherein said plurality of air outlets is adapted to allow air to be drawn into said plurality of conical structures to cause a plurality of jets of water-air froth to be discharged to an interior of the hydrotherapy tub.

15. **(Original)** The system of claim 14 wherein said plurality of conical structures is adapted to cause said plurality of jets to be discharged via a venturi effect.

16. **(Original)** The system of claim 1 wherein said plurality of outlets comprises a plurality of air outlets located inside a plurality of water outlets, wherein said plurality of air outlets is in fluid communication with said second chamber and said plurality of water outlets is in fluid communication with said first chamber.

17. **(Original)** The system of claim 16 wherein said plurality of outlets is adapted to draw air through said plurality of air outlets into said plurality of water outlets via a venturi effect to cause a discharge of a plurality of jets of water - air froth to an interior of the hydrotherapy tub.

18. **(Previously Presented)** The system of claim 1 wherein said first chamber comprises a first longitudinal portion, said second chamber comprises a second longitudinal portion, the hydrotherapy tub comprises an inner surface and wherein said body is configured to be mounted to cause said first longitudinal portion of said first chamber and said second longitudinal portion of said second chamber to be located about parallel to the inner surface of the hydrotherapy tub wherein said second chamber is configured to be located between said first chamber and the inner surface.

19. **(Withdrawn)** The system of claim 1 wherein said body further comprises at least one outlet cover for preventing transmission of at least one of water and air to the interior of the hydrotherapy tub from at least one outlet.

20. ***(Withdrawn)*** The system of claim 16 wherein said at least one outlet cover is moveably attached to said body for at least one of covering and uncovering at least a portion of said at least one outlet.

21. ***(Original)*** The system of claim 1 wherein said first chamber comprises a water chamber and said second chamber comprises an air chamber.

22. ***(Original)*** The system of claim 1 wherein said body is adapted to conform to an inner surface of the hydrotherapy tub.

23. ***(Original)*** The system of claim 1 wherein said body is adapted to be mounted to an inner surface of the hydrotherapy tub to cause said a plurality of axes of said plurality of outlets to be substantially perpendicular to said inner surface.

24. ***(Previously Presented)*** A hydrotherapy tub, said tub comprising:

an inner surface having an opening therethrough;

an air source and a water source;

a body mounted to a hydrotherapy tub such that said body covers said opening and said body is immovable and affixed to said inner surface during operation, said body having a first chamber in fluid communication with said water source through said opening and a second chamber in fluid communication with said air source through said opening;

a plurality of outlets adapted to receive water from said first chamber and to receive air from said second chamber;

wherein said plurality of outlets is configured to transmit the water and the air to an interior of the hydrotherapy-tub.

25. ***(Original)*** The system of claim 24 wherein said body comprises a water inlet adapted for fluid communication with the water source and said body comprises an air inlet adapted for fluid communication with the air source.

26. ***(Previously Presented)*** The system of claim 24 wherein said at least one outlet comprises a plurality of outlets adapted to provide a plurality of jets of water-air froth about perpendicular to an inner surface of the hydrotherapy tub.

27. ***(Original)*** The system of claim 24 wherein said at least one outlet is adapted to draw said ambient air via a venturi effect.

28. ***(Previously Presented)*** A fluid flow system for a hydrotherapy-tub, said system comprising:

a body configured to be mounted to a hydrotherapy tub having an opening through a surface of the tub such that said body covers the opening and said body is immovable and affixed to said surface during operation, said body comprising

a water inlet configured to extend through the opening;

an air inlet configured to extend through the opening, said water inlet and said air inlet being configured to transmit water and air, respectively, through the opening in the wall; and

means for providing a plurality of jets of water-air froth to an interior of the hydrotherapy-tub from said body.

29. ***(Original)*** The system of claim 28 wherein said air inlet is adapted for fluid communication with an ambient air source.

30. ***(Original)*** The system of claim 28 wherein said means for providing comprises a means for providing said plurality of jets of water-air froth about perpendicular to an inner surface of the hydrotherapy tub.

31. ***(Previously Presented)*** The system of claim 28 further comprising a water chamber and an air chamber, wherein said water chamber is adapted for fluid communication with said means for providing and a water source, through said water inlet, and the air chamber is adapted for fluid communication with said means for providing and an ambient air source, through said air inlet.

32. **(Original)** The system of claim 28 wherein said body further comprises a water chamber and an air chamber, wherein said body is adapted for mounting to an inner surface of the hydrotherapy tub to cause said air chamber to be located between said water chamber and the inner surface.

33. **(Withdrawn)** The system of claim 28 further comprising means for altering a number of jets of water-air froth provided by said means for providing a plurality of jets.

34. **(Previously Presented)** A method for controlling fluid flow to a hydrotherapy tub, comprising:

mounting a body to a hydrotherapy tub having an opening through a surface of the tub such that the body covers the opening and the body is immovable and affixed to the surface during operation, the body comprising:

an air inlet;

a water inlet, the water inlet and the air inlet extending through the opening and being configured to receive water and air, respectively, through the opening; and

means for providing a plurality of jets of water-air froth to an interior of the hydrotherapy tub from the body.

35. **(Original)** The method of claim 34 further comprising providing fluid communication between said air inlet and an ambient air source.

36. **(Original)** The method of claim 34 further comprising mounting said body to an inner surface of the hydrotherapy tub.

37. **(Withdrawn)** The method of claim 34 wherein the means comprises at least one outlet, the body further comprises at least one outlet cover and the method further comprises moveably attaching the at least one outlet cover to the body wherein the at least one outlet cover is adapted to cover the at least one outlet.

38. **(Withdrawn)** The method of claim 37 further comprising moving the at least one outlet cover to at least one of cover and uncover at least a portion of the at least one outlet.

39. **(Withdrawn)** The method of claim 37 wherein the providing the body comprises providing a water chamber adapted for fluid communication with the means for providing and a water source, through the water inlet, and providing an air chamber adapted for fluid communication with an air source, through the air inlet, and the means for providing.

40. **(Previously Presented)** A method for controlling fluid flow to a hydrotherapy tub, comprising:

mounting a body to a hydrotherapy tub having an opening through a surface of the tub such that the body covers the opening, the body is immovable and affixed to the surface during operation and the body receives water and ambient air through the opening; and

providing a plurality of jets of water-air froth to an interior of the hydrotherapy tub from the body.

41. **(Original)** The method of claim 40 wherein the providing comprises providing a plurality of jets of water-air froth about perpendicular to an inner surface of the hydrotherapy tub.